

ARGEO PAUL CELLUCCI
Governor

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
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TRUDY COXE
Secretary

DAVID B. STRUHS
Commissioner

June 24, 1998

Charles Fox & Lisa Lund
Office of Reinvention
U.S. EPA
401 M Street, S.W
Washington, D.C. 20460

Dear Mr. Fox and Ms. Lund:

I am pleased to share, for EPA's final approval, *the Project XL Final Project Agreement for the Massachusetts Environmental Results Program*.

This past year of negotiation between our agencies on Project XL designation has highlighted the historic crossroads we are at on the future of environmental regulation in this nation.

EPA's endorsement of the Massachusetts Environmental Results Program will signal our shared commitment to fundamentally overhaul the nation's 28 year-old, outdated environmental regulatory system.

Although great gains have been made over the past 28 years, the traditional regulatory system is clearly not as effective and efficient as it could be. EPA joining Massachusetts to champion new approaches that yield higher levels of compliance at less cost to industry and taxpayers will be a compelling response to Vice President Gore's 1995 challenge to EPA to find a "new model, a new paradigm." The Vice President correctly observed that "...in all cases we will learn something that will lead to an improved system of environmental management. For these projects to succeed, all of us must be ready to change, with new roles and responsibilities."

The Massachusetts Environmental Results Program represents such a challenge to change the way we manage environmental protection at the federal and state level. Simply put, ERP is the "next generation of environmental protection" -- a new regulatory system that delivers real environmental results at less cost, and increases corporate accountability while providing maximum flexibility for compliance.

For the past year, almost 2,000 dry cleaners and photo processors have been in ERP. For dry cleaning operations, we expect that ERP will result in an annual 43 percent reduction in fugitive emissions of the carcinogen Perchloroethylene. For photo processors, ERP will result in a 99% reduction in discharges of silver.

Participation has been robust. Last fall when we launched ERP for those 2,000 companies, we had an 85% participation rate -- an unheard of record for a first-run program.

The results have been impressive. Of the companies that certified in ERP, over 10% of them *self-identified non-compliance and submitted plans to return to compliance. This 10% increase in compliance happened before DEP undertook any compliance inspections.*

Now we have begun inspections and certification audits of companies in ERP -- and aggressive enforcement against facilities caught by our new compliance system. For example, two major retail companies, agreed this week to pay a total of \$55,000 in fines for 85 of their facilities which submitted false, inaccurate, incomplete or misleading certifications, including failure to provide required data in their certifications to prove they were meeting the 2 ppm silver discharge limit for ERP photoprocessors. *These are facilities that we would never have caught under the old permit-driven system.*

The latest news is that we have just added 2,200 printers to the Environmental Results Program. Our expectation for environmental compliance is no less ambitious for this sector. We expect that ERP will result in a 500 ton reduction of VOC emissions for this industrial segment. *This is a 30% reduction in VOC emissions for the printing industry in Massachusetts.*

The Massachusetts Environmental Results Program has lived up to its name. EPA's designation of ERP as an XL Project will help remove federal barriers to superior levels of environmental compliance and performance.

We look forward to your final approval of this FPA.

Sincerely,

Allan Bedwell
Deputy Commissioner

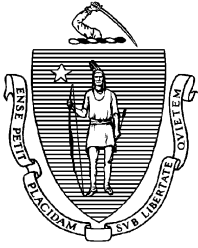
P.S. This FPA represents the thoughtful work of both DEP and EPA staff. In particular, I would like to thank Tom D'Avanzo, Anne Leiby and Anne Kelly of EPA-New England, Steve DeGabriele and Alissa Whiteman of DEP for their good work!

Attachments:

ERP Enforcement Press Release

List of 36 National Constituent Organizations consulted on ERP by Massachusetts DEP

cc: John DeVillars, EPA-New England Regional Administrator
Sylvia Lowrance, EPA Deputy Assistant Administrator
Mindy Lubber, EPA-New England Deputy Regional Administrator
David Struhs, Massachusetts DEP Commissioner



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**Additional Groups DEP has Consulted Since the February 25, 1998 ERP Briefing of National
Constituency Groups in Washington, D.C.:**

ACEEE
American Institute for Pollution Prevention
American Rivers
Bauman Foundation
CERES
Center for Clean Air Policy
Center for International Environmental Law
Center for Marine Conservation
Clean Water Action
Environmental Business Council
Environmental Defense Fund
Environmental Law Institute
Institute for Conservation Leadership
Freshwater Institute
Lemelson Center
National Association of Environmental Managers
National Environmental Education Trust Foundation
National Environmental Policy Institute
National Fish and Wildlife Association
National Governors Association
National Resource Defense Fund Council
Northeast Environmental Business Network
President's Council on Sustainable Development
Renew America
Resources for the Future
River Network
Sierra Club
The New England Council
U.S. Chamber of Commerce, Resources Policy Department
U.S. Government Accounting Office
U.S. House Appropriations Committee, VA, HUD and Independent Agencies Sub-Committee
U.S. House Commerce Committee
U.S. House Committee on Small Business
U.S. Senate Environmental Public Works Committee
USPIRG
Wildlife Habitat Council

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DEP on the World Wide Web: <http://www.magnet.state.ma.us/dep>

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**PROJECT XL FINAL PROJECT AGREEMENT
FOR THE MASSACHUSETTS ENVIRONMENTAL RESULTS PROGRAM
May 5, 1998**

I. PARTIES TO THE AGREEMENT AND STATEMENT OF PURPOSE

This Final Project Agreement (Agreement or FPA) is entered into by the Regional Administrator of the U.S. Environmental Protection Agency-New England (EPA) and the Commissioner of the Massachusetts Department of Environmental Protection (DEP). It will guide the working relationship of both agencies in fulfilling the promise of the Massachusetts Environmental Results Program (ERP) as a regulatory improvement project.

ERP is an innovative regulatory compliance system designed by DEP that promises to achieve superior environmental results by replacing the current state permit system with a more cost-effective system that greatly improves performance. The purpose of this Agreement is to establish an expedited EPA review process for any changes to federal regulations and/or policies that DEP may propose to ensure effective ERP implementation.

Because DEP will apply ERP to several industrial and commercial sectors, sector-specific addenda to the FPA may be added in the future. This document represents the first phase (the "umbrella FPA") and establishes the fundamental criteria for establishing and evaluating: needed federal regulatory flexibility, superior environmental benefits to be derived from changes to federal regulations, timelines for identifying and resolving state/federal differences, and legal mechanisms to implement flexibility granted as a result of the process (which may include changes to federal regulations). This umbrella FPA does not grant any specific federal regulatory flexibility. Requests for federal regulatory flexibility will be addressed when DEP identifies instances where such federal regulatory flexibility is needed, and negotiates sector-specific addenda with EPA.

Subsequent phases of the FPA development will appear as separately negotiated and signed sector-specific addenda to this umbrella FPA. These addenda will be submitted by DEP only for those sectors for which flexibility from federal regulations or policies is needed. DEP and EPA will work collaboratively and early to make these determinations. The addenda may cover a specific ERP sector or multiple sectors in which the same issues arise. Future sectors under development that may or may not require flexibility from federal regulations or guidance are: printers, industrial wastewater-to-sewer dischargers and new and modified combustion sources. Each addendum will identify the: flexibility DEP needs to smoothly implement ERP in a specific commercial or industrial sector, the superior environmental performance to be gained as a result of extending ERP to that sector and the evaluation process to judge ERP's effectiveness with respect to the particular sector.

In accordance with Project XL guidance, the measurable Superior Environmental Performance associated with a particular sector will be commensurate with the degree of federal flexibility being granted for that sector.

While this Agreement is intended to articulate clear environmental objectives and provide for meaningful collaboration to achieve success, both agencies recognize that developing a first-in-the-nation new regulatory system is, by its very nature, an evolutionary process. Thus, a variety of approaches will need to be tested in optimizing this "next generation" of environmental regulation.

Both DEP and EPA are committed to expediting the development, implementation and evaluation of ERP so the benefits of this new program may be quickly realized. From the inception of ERP, DEP has been committed to creating a new regulatory system that will deliver superior environmental protection, increased flexibility for businesses and reduced costs to taxpayers.

While this Agreement is between DEP and EPA, both agencies recognize the significant role played by Massachusetts environmental and public interest groups, industry and business associations, and individual citizens in establishing and attaining environmental goals.

II. OVERVIEW OF THE ENVIRONMENTAL RESULTS PROGRAM

A. Introduction to ERP

The Massachusetts Environmental Results Program (ERP) has taken the bold step of rethinking the environmental regulatory system in order to achieve more effective environmental protection. ERP promises to make it easier for the regulated community to meet and exceed Massachusetts' strict environmental standards by giving them flexibility to decide the best, most cost-effective ways to comply with performance standards.

By converting permit requirements into industry-wide performance standards, the DEP anticipates superior environmental performance since facility managers will be aware of their environmental obligations *before* they make decisions about modifying equipment and operations, rather than at the end of a long, expensive permitting process. This will give companies more flexibility to choose cost-effective compliance strategies for themselves, thereby reducing the "time to market" for new products and removing regulatory obstacles to pollution prevention. Since all companies will ultimately be held to strict ERP performance standards, environmental protection will be strengthened.

For the first time ever senior-level company officials will certify annually that they are -- and will continue to be -- in compliance with all applicable air, water and hazardous waste management performance standards throughout the facility. In addition, ERP companies will be accountable for reporting any releases or exceedances of discharge or emission standards that required notification of the DEP. Violations of appropriate standards will be reported and a "Return to Compliance Plan" submitted to DEP if any such violations are outstanding at the time of certification.

So why has Massachusetts DEP chosen to rethink the 28 year-old conventional permitting approach to regulating companies? For several reasons.

First, the current permitting system limits DEP's ability to target the greatest threats to human health and the environment in Massachusetts. The industrial sectors and activities eligible for the Environmental Results Program represent a disproportionate amount of time spent by staff writing permits relative to their

environmental risk. For example, DEP has spent significant resources issuing air permits to some 4,400 facilities, of which two-thirds are small and medium-sized firms that together generate less than five percent of the state's total air pollution.

Second, these facilities have historically exhibited high rates of noncompliance, including being outside the regulatory system entirely. Almost all of Massachusetts' 8,000 waste sites are formerly permitted or regulated facilities.

Third, a primary objective of ERP is to focus DEP's limited resources where they will make the biggest difference: conducting compliance audits and facility inspections. Moving away from traditional permitting and concentrating on compliance assurance, enforcement, and technical assistance will ultimately lead to superior environmental performance across whole sectors of the Massachusetts economy.

Fourth, the ERP annual certification represents a commitment by senior-level company officials that ongoing attention is directed toward ensuring that pollution not take place, rather than a one-time permit "pledge" not to pollute. Just as the waste site clean up program in Massachusetts fundamentally restructured its oversight system whereby the Department could focus its limited resources on the highest environmental priorities, the Environmental Results Program promises such a targeted, prioritized and rational approach.

To date, DEP has promulgated regulations governing ERP certifications in general and targeted nearly 5,000 companies within three commercial sectors -- dry cleaning, photo processing, and printing -- for inclusion in the program. Soon ERP will also be expanded to encompass facilities that currently require industrial wastewater permits for sewer discharges or air pollution control permits for new or significantly modified boilers.

For all businesses that participate in ERP, a quagmire of requirements spread over thousands of pages of technical regulations will be transformed into clear performance standards and easy-to-read workbooks that not only spell out what is required for compliance, but encourage pollution prevention, recycling and good environmental management practices. Based on ERP progress to date, DEP expects to submit sector-specific addenda to this umbrella FPA as follows:¹

1. Drycleaning Sector: Within 60 days of the final signing of this FPA.
2. Printing Sector: Within 60 days of the final signing of this FPA.

B. ERP Strategy

This section describes the elements of the ERP strategy. Although each ERP sector will contain the elements listed below, the specific emphasis on each element will vary depending on the unique characteristics of the sector, the amount of DEP resources available, and the degree of environmental risk posed by the sector.

¹ERP for photo processors does not require federal regulatory flexibility.

1. **Clear Standards and Compliance Assistance:** ERP eliminates existing requirements that facilities obtain permits prior to commencing or changing operations. Instead, companies are required to meet -- and certify their compliance with -- industry-wide environmental performance standards established by DEP. The standards are developed to be at least as environmentally protective as the previously applicable permit requirements, but also flexible enough that companies can choose the compliance paths they believe will be most cost-effective for them. Ultimately, DEP believes that superior environmental performance will result since ERP regulations, combined with pollution prevention and compliance assistance, will encourage companies to achieve results beyond compliance with current requirements. Sector-specific workbooks and training sessions, developed in conjunction with industry representatives, spell out the standards and what they mean in plain language, and outline various options for achieving compliance.
2. **Corporate Accountability and Self-Evaluation:** Following a period of outreach and training, companies submit to DEP a statement in which they certify compliance with applicable environmental standards and affirmatively promise to maintain compliance for the coming year. Certifications are signed under the pains and penalties of perjury by the facility's owner, president, CEO or other high-ranking official. If a facility is not in compliance when it certifies, it must identify the existing violation(s) and include a Return to Compliance Plan that specifies how and when compliance will be achieved.²
3. **Pollution Prevention:** ERP emphasizes pollution prevention and incorporates pollution prevention practices and principles into the performance standards themselves where appropriate. For example, ERP requires:
 - Photo processors and printers that discharge or ship wastewater to publicly-owned treatment works (POTWs) to install silver recovery units.
 - Area-source dry cleaners -- even smaller ones not subject to EPA's Maximum Available Control Technology (MACT) standards -- to replace transfer machines installed after September 1993 with dry-to-dry machines and carbon absorbers installed after that date with refrigerated condensers.
 - Area-source dry cleaners to monitor their systems weekly for perceptible leaks (those that can be detected using sight, smell or touch), to use specified leak detection instruments, and to make repairs within a specified timeframe.
 - Printers to use cleanup solutions that are either low in volatile organic compounds (VOCs) or low in evaporation rate.

² The fact that it submits a Return to Compliance plan does not shield a company from enforcement by DEP or EPA.

- Screen and flexographic printers that emit greater than one (1) ton of VOCs per year to use low VOC inks.
- Lithographic printers that emit greater than one (1) ton of VOCs per year using web-fed presses to use no alcohol in their fountain solutions.
- Lithographic printers with sheet-fed presses that do not use alcohol but emit greater than one (1) ton of VOCs per year to use low VOC fountain solutions.

DEP estimates that compliance with ERP standards will reduce by 99 percent the volume of silver currently being wasted by photo processors. In other words, up to two and a half tons (5,514 pounds) of silver will be recycled each year instead of discharged. ERP will also yield an estimated 43 percent or a 500 ton-reduction in perchloroethylene emissions each year from Massachusetts dry cleaners, and significant reductions in the use of solvents and alcohol in fountain solutions among commercial printers. These examples illustrate the type of emissions reductions that DEP believes will occur from sectors that are already part of the ERP program; similar types of environmental results are expected from future ERP sectors.

Beyond what ERP requires, the program will also encourage the adoption of pollution prevention techniques that are good both for the environment and for a company's bottom line. Thus far, the ERP workbooks for dry cleaners and photo processors have provided sector-specific guidance and information on implementing pollution prevention techniques (e.g., information on wet cleaning for dry cleaners) and subsequent workbooks will contain similar tips.

4. **Enforcement:** DEP believes the ERP approach -- clear performance standards written in plain language, targeted compliance assistance, an emphasis on pollution prevention, and required annual certifications -- will yield environmental results superior to those achieved through permitting. At the same time, DEP has designed ERP with an emphasis on strong enforcement.

All companies participating in ERP are, and will remain, subject to regular DEP inspections and the agency's standard enforcement protocol, including but not limited to department administrative actions (i.e., notices of noncompliance, administrative orders and penalties) and referrals to the DEP's Environmental Strike Force and/or the Office of the Attorney General for civil and criminal prosecution as appropriate.

Enforcement will be used against companies that fail to certify at all, fail to certify on time, submit fraudulent or deficient certifications, or are in violation either at the time of certification or during the subsequent year. It is important to note that submission of a Return to Compliance Plan, (see discussion at section III A.2.c) does not shield a company from enforcement. Nonetheless, DEP recognizes that a firm's due diligence in discovering violations, making disclosure on the Return to Compliance Plan, and correcting them expeditiously may provide evidence of a good faith effort to maintain compliance with ERP standards. For additional information about enforcement, see Section III A.2d.

5. **Evaluation:** For the past year and a half, DEP has been measuring and evaluating the environmental results of ERP by using "environmental business practice indicators" (EBPIs), compliance inspection findings, and data reported on certification forms. In addition, DEP has used statistical analysis and random sampling techniques. These methods will continue to be used in the future. For additional information about evaluation, see Section III.C.

III. PROJECT XL CRITERIA

A. Superior Environmental Performance

ERP will achieve measurable superior environmental performance beyond what is achieved by the current national regulatory system. ERP improves accountability and increases flexibility for companies. It also provides an extensive amount of technical and pollution prevention assistance for these sources³

1. Achieving and Evaluating Pollution Prevention Objectives

a) Strengthen regulatory effectiveness through inclusion of pollution prevention and waste reduction measures: DEP's experience with incorporating pollution prevention and waste reduction measures into ERP regulations for dry cleaners and photo processors is listed in Section II.B.3.

ERP regulations have been and will continue to be developed in a collaborative process with extensive stakeholder involvement so that similar opportunities to incorporate pollution prevention and waste reduction measures can also be identified and incorporated where appropriate. Such measures often result in both reduced waste and reduced costs to the affected facility. These measures may include materials substitution such as requiring the use of low VOC materials, improved operating practices, or other methods. Specific measures and regulatory language will be developed through the sector specific workgroups and addenda development process discussed in Section V.

b) Promote pollution prevention through outreach and assistance: In addition to strengthening ERP regulations by incorporating pollution prevention and waste reduction opportunities, DEP will also undertake an extensive amount of pollution prevention and technical assistance outreach in its work with ERP sectors. Again, DEP's past performance serves as a model for the future.⁴ For dry

³The exact nature and amount of pollution prevention and technical assistance provided will be commensurate with DEP's available resources and the opportunities for pollution prevention within a particular sector.

⁴ The Massachusetts Printers Partnership, (MP2), provides demonstrable proof that providing regulated entities with clear performance standards accompanied by targeted compliance assistance improves their environmental performance. In a random telephone survey of 322 printers -- participants and non-participants each making up about half-- 53 percent said the workbook developed for their industry strongly influenced their environmental practices. In addition, 69 percent of the Partnership participants surveyed who attended a workshop explaining the standards said that such training was similarly influential.

cleaners and photo processors, DEP developed detailed, customized, workbooks providing step by step guides to both compliance and pollution prevention methods. This information was developed through extensive interaction with experts both within and outside the affected industry. The information in these manuals was reinforced through a series of industry workshops throughout the state.

Future ERP sector work will entail similar outreach and assistance intended to ensure understanding and use of the workbooks. Sector-specific strategies will vary, but the goal for each will be to ensure that the regulated community understands both the regulatory requirements and has the most current information on pollution prevention methods and resources that will enable them to superior environmental results. EPA and non-governmental experts will be solicited as appropriate to assist with this outreach.

c) Include measurement and evaluation : As discussed later, DEP is undertaking a thorough evaluation of each sector through both evaluation of self certifications and field inspections. Key to this process is the development of Environmental Business Practice Indicators,(EBPI's), selected measures of both compliance and overall performance. EBPIs will give DEP and EPA a good understanding of the measurable results that have been achieved for both compliance and pollution prevention as a result of ERP.

2. Compliance Assurance and Enforcement Because ERP is a sector-based XL project proposed by a regulatory agency, strategies to ensure compliance with stronger regulations that include innovative pollution prevention and waste reduction measures are an appropriate component of the Superior Environmental Performance basis for the Agreement. By providing companies with clear performance standards, increasing corporate accountability, promoting self-evaluation and maintaining a strong DEP enforcement presence, ERP will improve industry-wide compliance. Specifically, it will:

a) Give DEP a far better understanding of the regulated universe as a whole: Before targeting any sector, DEP must take an "inventory " of the facilities within it. Then, throughout development and implementation, the agency uses a variety of techniques, including phone calls and mailings, to refine the list of facilities that will ultimately receive ERP certification packages (including a workbook, a self-certification statement and a form to be submitted if the facility determines that it is not subject to ERP). DEP then performs a certain number of inspections to verify that facilities claiming they are not subject to ERP are indeed exempt. In addition, DEP's analysis of industry-wide environmental performance will provide better information than is currently available about each facility's actual performance. Thus, DEP will be in a far better position to target its compliance and enforcement efforts, and will know more about the actual environmental behavior of the regulated universe. Finally, an automated certification process will enable DEP staff to spend more time in the field conducting inspections and targeting high priority environmental threats. ERP also will encourage businesses to implement pollution prevention and other environmentally desirable practices as explained throughout this Agreement.

b) Increase the number of facilities operating within DEP's "regulatory net" : Dry cleaners, for example, are regulated but most do not currently need a permit. Under ERP, all of the estimated 890 dry cleaners in the state were required to submit self-certification statements to DEP or to notify DEP that they are not subject to ERP. The Massachusetts Printer's Partnership (MP2) -- a pilot program and

precursor to ERP in which printers voluntarily certified compliance with performance standards in lieu of obtaining certain permits -- doubled the number of printers within DEP 's regulatory net. Based on preliminary information, ERP has nearly tripled the number of dry cleaners and photo processors in Massachusetts regulatory system. DEP expects similar results when it develops ERP certification standards for companies that discharge industrial wastewater to sewers. Currently, the vast majority of the approximately 8,000 firms that need a state sewer connection permit do not have one.

c) Improve Corporate Accountability and Promote Industry Self Evaluation : ERP promotes comprehensive industry self-evaluation and increases corporate accountability by requiring senior-level managers to certify, on an annual basis, compliance with environmental performance standards. A company that is not in compliance when it certifies must disclose its status on the certification form and submit a Return to Compliance Plan. The plan must specify interim milestones toward achieving compliance, and commit to a date by which the facility will have returned to full compliance with the cited requirement. Environmental managers from 21 companies that participated in the ERP Demonstration Project attested to the benefits of increased senior-level awareness of environmental issues (see attached ERP Demonstration Project Evaluation). In the Massachusetts Printers Partnership, meanwhile, certifiers exhibited better environmental behavior than printers that chose not to certify. According to performance measures chosen at the beginning of the effort, the “environmental behavior” of certifiers was 50 percent better than that of non-certifiers.

d) Enforcement: Enforcement and DEP “field presence ” has always been and will continue to be an important component of the ERP strategy. The previously mentioned telephone survey of commercial printers, (see footnote #5) found that 68 percent identified anticipation of a DEP visit or enforcement action as a strong motivation for behavioral change and highly influential in their decisions to improve their environmental practices. DEP’s enforcement strategy includes:

i) Field Inspections: DEP is maintaining an appropriate-level field presence to assure compliance. In addition to random inspections described in the Evaluation Section, DEP’s regional offices will target for ERP inspections those companies that:

- Are identified to be within an ERP sector and fail to respond to DEP mailings (including Notices of Noncompliance for failing to certify) or telephone calls;
- Trigger “red flags” during certification review (see below);
- Have been the subject of complaints referred to DEP for investigation and follow-up (by agency staff, EPA, other companies in the sector, or concerned citizens); and
- Claim they are not subject to ERP.

ii) Certification of Compliance Assurance : In addition to inspections, DEP is taking steps to ensure that data reported on ERP certification forms is accurate. The compliance assurance process DEP will use is depicted on an attached schematic diagram. First, DEP reviews each certification form for completeness. When a certification is not complete, DEP notifies the facility in writing and requires that the missing information be provided within a specified time period.

Once a certification is deemed complete, DEP reviews it to ensure that it is technically sufficient (i.e., the answers are internally consistent). If a response is technically deficient, DEP takes one of three paths of escalating action -- including field inspections and possible penalties -- depending on the severity of the total deficiencies in the aggregate. DEP also reviews any ERP Return to Compliance Plans submitted to ensure that the remedies chosen are appropriate and timely. When proposed plans are deficient, appropriate enforcement actions are taken. Even in cases where the remedy is appropriate and timely, certain violations (e.g., illegal discharges) may trigger “red flags” that result in DEP inspections. DEP has developed a new ERP information system into which data from ERP certification forms is entered. At present, this system requires manual data entry and review to verify certifications and track compliance and enforcement actions. DEP uses the aggregate data to assess sector-wide environmental results and impacts. Beginning in the next six months, DEP will upgrade the system so it can accept full on-line submission of certifications, conduct automated administrative completeness reviews, and “flag” certifications for audits and inspections. DEP will assess and evaluate this system on an ongoing basis and, if needed, upgrade it to the extent possible.

B. Innovations/Pollution Prevention

Massachusetts has been a national leader in promoting pollution prevention as a tool to assure environmental protection, regulatory compliance and economic competitiveness. DEP, the Massachusetts Office of Technical Assistance for Toxics Use Reduction (OTA), and the Toxics Use Reduction Institute (TURI) at the University of Massachusetts-Lowell all participate in this effort.

Indeed, pollution prevention is a centerpiece of ERP. Pollution prevention is incorporated into ERP performance standards whenever possible and sector-specific workbooks provide guidance and information on employing suggested pollution prevention techniques. For more detail on pollution prevention in ERP, see Section II.B.3. DEP is also evaluating the extent to which ERP facilities engage in pollution prevention activities. See Section III.C.

In addition, DEP has developed a training curriculum for DEP staff on photo processing and dry cleaning. This training provides DEP staff with an overview of the photo processing and dry cleaning processes, multi-media regulatory issues, and pollution prevention opportunities. If funding becomes available, DEP will develop similar training modules for future ERP sectors.⁵

Finally, ERP is bringing hundreds of previously unregulated or under-regulated sources “into the system.” This alone should prompt companies to engage in better environmental management practices, which often translates into pollution prevention.

C. Evaluation

⁵Funding for training DEP staff about photo processing and dry cleaning was supplied by an EPA grant.

For the past year and a half, DEP has been measuring and evaluating the environmental results of ERP by using "environmental business practice indicators" (EBPIs), compliance inspection findings, and data reported on certification forms. In addition, DEP has used statistics and random sampling techniques. These methods will continue to be used in the future.

EBPIs are essentially industry-specific performance measures that provide a snapshot of a facility's environmental performance. They are practices which, if followed, reflect a facility's level of environmental performance, including both traditional regulatory standards and "beyond compliance" measures.

DEP is using data collected from a statistically significant number of random inspections and ERP certification forms to calculate industry-wide EBPI scores. DEP does not plan to inspect each regulated facility; instead, the agency will use statistics to determine the appropriate number of facilities from the full universe for random sampling. Inspection data from these facilities will be compared to information supplied on all certification forms. The results of this comparison will be used to determine the accuracy of the aggregate certification data. At that point, an industry-wide compliance rate can be determined.

DEP used the techniques described above to evaluate the success of the Massachusetts Printers Partnership. Together with key stakeholders, the agency chose 19 EBPIs including regulatory requirements, pollution prevention techniques and good environmental management practices. DEP staff performed inspections at randomly chosen facilities both before and after program startup and used data from these inspections to calculate an industry-wide "before" EBPI score, as well as two "after" scores -- one for printers that "joined" the Partnership by certifying compliance and one for those that did not. Using statistics, DEP then compared these scores and determined the score for certifiers -- and therefore their overall environmental behavior -- was approximately 50 percent higher than that of both the "before" sample and the non-certifiers. There was no statistically significant difference in the scores/behaviors of the latter two sample groups.

DEP is also evaluating whether ERP has brought a greater proportion of facilities "into the system" for each sector by comparing "before" and "after" numbers of those regulated within each ERP sector. In addition, DEP is analyzing the increase in the number of "known" facilities that end up not being subject to ERP (i.e., those facilities that respond to ERP-related mailings or phone calls by informing DEP that the program does not apply to them).

Among the questions to be answered as part of the ongoing evaluation of ERP:

- What is the actual environmental performance, as measured by EBPIs, for the sector? For each specific EBPI, what is the industry-wide score? Why are there differences in EBPI scores among different sectors, different groups within a sector and among specific EBPIs?
- Do we know all of facilities subject to regulation in each sector?
- What percentage of that universe has returned certification forms in a timely way?
- Are certification forms administratively complete or are there omissions?
- Have forms been certified by appropriate senior-level company officials?
- Is the information provided by facilities on certification forms internally consistent?

- How does information provided by facilities compare with inspection results? What is the level of accuracy of the data reported by facilities?
- Are inconsistencies attributable to implementation of a new program, or lack of clarity in the workbooks or forms, or are they evidence to initiate enforcement?

For sectors where federal regulatory flexibility is needed, DEP will work with EPA and important stakeholders during the development of the sector-specific addenda to decide what the EBPIs should be. Both agencies acknowledge that some reasonable amount of time must be allowed to pass before determinative conclusions about a particular sector can be drawn. The sector-specific addenda will include appropriate evaluation milestones. If the evaluation period extends beyond the life of this FPA as set forth in Section IV.A, extension of the FPA can be considered consistent with that section.

D. Regulatory Flexibility

For those sectors where DEP will be seeking flexibility for federal regulations and/or policies to ensure smooth and efficient ERP implementation, DEP and EPA will develop sector-specific addenda to this FPA, which will identify the needed flexibility. See Attachment A for a list of the areas where DEP anticipates that it will be requesting flexibility for the drycleaning, and printing sectors. The inclusion of this list as part of this FPA does not constitute a formal request by DEP for regulatory flexibility, nor does it imply that EPA is granting any flexibility as part of this umbrella FPA. Requests for such flexibility will be addressed as part of the development of the sector-specific addenda outlined in Section V.

E. Stakeholder Support

For the last two years, DEP has worked to actively ensure the involvement of key stakeholders and the general public in ERP development. In addition, DEP will continue to ensure a high level of public involvement in the development of this agreement and sector-specific addenda to it.

1. Stakeholder and Public Involvement to Date

a) *ERP Design Team*: DEP has developed ERP with the active participation of its ERP Design Team, comprised of representatives from EPA, other government entities, environmental advocacy groups, business and industry, consulting firms and the legal community. For more than a year, members of the Design Team met once a week to review and comment on various decision and discussion documents.⁶

Members of the Design Team were drawn from groups representing:

i) **Environmental Advocacy**: Conservation Law Foundation, Environmental League of Massachusetts and Massachusetts Public Interest Research Group;

⁶ Some of the decision documents discussed and endorsed by members of the ERP Design Group include the following: (1) ERP Applicability: Facilities Included in the Program and Performance Standards Covered in the Certification; (2) ERP Compliance Certification Statement Objective (3) Environmental Impacts of Facilities Included in the Environmental Results Program Universe, and (4) ERP Demonstration Project Plan.

ii) Business and Industry : American Electroplating and Surface Finishing Society, Associated Industries of Massachusetts, Gloucester Co., Massachusetts BioTech Council, Massachusetts Chemical Technology Alliance, Massachusetts High Technology Council, the National Association of Industrial Office Parks, New England Environmental Business Council, Northeast Circuits Association, Printing Industries of New England and Small Business Association of New England;

iii) Environmental and Industry/Government Consultants : Goldman Environmental Consultants, Greiner Environmental and Mass Insight;

iv) Legal Organizations: Boston Bar Association and Massachusetts Attorney General's Office; and

v) Government Entities: DEP, EPA, Massachusetts Environmental Health Association, Massachusetts Office of Technical Assistance for Toxics Use Reduction (OTA), Massachusetts Pretreatment Coordinators Forum and Massachusetts Water Resources Authority.

b) ERP Demonstration Project: As part of a Demonstration Project, technical teams -- comprised of technical staff from DEP, EPA, OTA and the affected industries -- were established to design performance standards and a whole-facility certification form for dry cleaning, photo processing, electroplating, biotechnology and polymerization, metal finishing, zero discharge units, industrial wastewater, surface coating, degreasing and adhesion. All ERP Demonstration Project standards were reviewed by the ERP Design Team.

c) Development of Industry Sector Standards : DEP has developed sector-specific performance standards, regulatory revisions, workbooks and training only with the active participation of advisory groups made up of representatives of the affected industries.

i) Dry Cleaners: The dry cleaning advisory group generally met on a weekly basis from October 1996 through July 1997 and was comprised of representatives from Independent Dry Cleaners (approximately 900 members), Korean Dry Cleaners Association (300 members), the Northeast Fabricare Association (400 members) and Western Dry Cleaners Association (100 members).

ii) Printers: The Massachusetts Printers Partnership commenced in the spring of 1995 and included collaboration with Printing Industries of New England (PINE), which represents about 300 commercial offset lithography printers, and the Screenprinting & Graphic Imaging Association (SGIA), which represents about 1,200 screen printers nationwide. A workbook was developed between April 1995 and February 1996. OTA was a partner in the core development team and presented twelve statewide workshops and clinics from February to June 1996. Currently, the same advisory group plus a representative of the national Flexographic Technology Association is assisting DEP with ERP sector development for printers.

iii) Photo Processors: From July 1996 through August 1997, the photoprocessor advisory group met at least monthly. Its membership includes representatives of CVS Pharmacies Photo Operations, Eastman Kodak, Goldman Environmental Consultants, the Massachusetts Water Resources Authority, Noble Camera Shops and Precision Environmental Consulting.

iv) Industrial Discharge to Sewers and Boiler Installation/Modification : Advisory groups are currently being assembled for the two categories of business to be included next in ERP -- those that discharge industrial wastewater to sewers and those that are planning to install or modify boilers. Both of these ERP components are in the early development stage.

d) *MEPA: Environmental Notification Form*: To solicit additional public input on the proposed amendments to state regulations for dry cleaners and photo processors, and on the ERP concept in general, DEP submitted an Environmental Notification Form (ENF) to the Massachusetts Environmental Policy Act (MEPA) unit of the Executive Office of Environmental Affairs (EOEA). MEPA is a state statute requiring that state agencies take all feasible steps to minimize environmental damage when they take action (which includes promulgating new regulations). Comments were received from the City of Boston's Environment Department, the Northern Middlesex Council of Governments, the Montachusett Regional Planning Commission, and EPA. On December 23, 1996, the EOEA Secretary concluded that no further MEPA review was required at the time because "the project is designed to enhance environmental protection, the ENF provides sufficient detail on how the proposed regulatory changes will function, and the upcoming [Massachusetts] Administrative Procedures Act process will allow for public input into specific regulatory language."

e) *Regulation Promulgation Process*: When state agencies propose regulations for promulgation, the Massachusetts Administrative Procedures Act (Massachusetts General Laws c.30A), requires them to give public notice of the regulations' availability for review and of the dates, times and locations of public hearings. DEP followed this procedure when promulgating ERP regulations for dry cleaners, photo processors and commercial printers, and will continue to do so when regulations for subsequent sectors are proposed.

In addition, pursuant to Executive Order 384 (EO 384), DEP must provide advance notice of all regulatory revisions to the Massachusetts Executive Office of Environmental Affairs (EOEA) and the Executive Office for Administration and Finance (A&F), including a written description of proposed changes and an assessment of their impact on both the regulated community and the public. A copy of the EO 384 submittal is provided to anyone who requests a copy of draft DEP regulations.

DEP regulations also must receive approval from the Massachusetts Water Resources Commission (WRC), an oversight body created by statute to protect and manage the state's water resources. The WRC is comprised of the EOEA Secretary, representatives of five EOEA agencies (DEP; the Department of Environmental Management; the Metropolitan District Commission; the Department of Fisheries, Wildlife and Environmental Law Enforcement; the Department of Food and Agriculture), the Secretary of the Executive Office of Communities and Development, and six at-large members appointed by the Governor, each representing a major type of water user and demonstrating knowledge of and interest in water resource management issues.

2. Continued Stakeholder and Public Involvement

a) *FPA Development*: DEP has actively sought stakeholder input as the ERP XL process has unfolded. DEP has kept the ERP Design Team apprised of its efforts to obtain Project XL designation for the program and will continue to involve the group by inviting its direct participation in the development of

this draft FPA. The Design Team meeting of January 29, 1998, served as the "kickoff" for public review of this FPA. At the meeting, DEP shared copies of the draft with the Design Team members and further explained the XL application process. DEP is also committed to ensuring that members of the general public have easy access to the ERP XL project development process and to information about the environmental results of the project. DEP published notices in several major newspapers and on DEP's web site (www.state.ma.us/dep), inviting public participation in the meeting and comment on the FPA. The document itself was posted on DEP's web site. The draft FPA was officially transmitted to EPA on January 26, 1998.

b) *ERP Sector Development:* DEP will continue to involve and inform the ERP Design Team, sector-specific advisory groups and the general public in the development of future ERP sectors and sector-specific addenda to this Agreement. The specific sector advisory group will play an integral role in soliciting input from interested stakeholders. Generally, each advisory group will invite the participation of DEP and EPA staff, industry representatives, environmental advocates, and staff from OTA. The general public, through DEP's website will also be invited to participate in these sector-specific advisory groups. Proposed sector-specific regulations will be made publicly available through the promulgation process previously described in Section E.1.e. Draft sector-specific addenda will be made publicly available, and interested stakeholders will be invited to provide input, through the process described in Section V.B.6.

F. Transferability

ERP is easily transferable to other states. Massachusetts has been contacted by over 20 states seeking to replicate the Environmental Results Program in order to modernize their own regulatory programs. In addition, DEP believes that ERP may easily be adapted to federal permitting.

G. Feasibility

As demonstrated by the Massachusetts Printers Partnership and the ERP demonstration project, ERP is feasible. In addition, DEP will continue to evaluate ERP for each sector as explained at Section III.E.

H. Risk Shifting

ERP will not result in any shifting of risk from one environmental medium to another. On the contrary, by dealing with whole industries in a multi-media fashion rather than issuing medium-specific regulations and permits to individual facilities, ERP will ensure that environmental and public health risks are isolated and reduced. In addition, ERP will enable DEP to focus its limited resources on activities either outside or within ERP sectors that pose the highest risk to human health and the environment.

IV. SCOPE OF UMBRELLA FPA

A. Duration of the Agreement

This umbrella FPA will be in effect for the period of 10 years from the time that it is signed, unless it is terminated earlier or extended by agreement of both parties. (If the Agreement is extended, stakeholders will be notified for their input and a Federal Register Notice will be published.) The term of this FPA

does not affect the term of any future rule or other enforceable mechanism that may be approved to implement the requested regulatory flexibility for ERP sectors.

Any party may terminate its participation in this project at any time.

B. Modification of the Agreement

At any time, either Party may modify the FPA with the concurrence of the other Party. Any modifications will be subject to notice and comment in the Federal Register. MA DEP will also provide notice to stakeholders to solicit their input on any proposed modifications prior to publication in the Federal Register.

C. Legal Basis for Project Implementation

This umbrella Agreement is intended to be a joint statement of the MA DEP's and EPA's plans and intentions with regard to the ERP XL project. It is intended to represent the commitment of each agency to carry out the project. The Agreement is not, however, intended to create legal rights or obligations and is not a contract, or a regulatory action such as a permit or rule, although certain requests for regulatory relief that may be addressed in the sector-specific addenda may be implemented through a separate rule that will be legally enforceable. This Agreement does not give any Party a right to sue other parties for any alleged failure to implement its terms, either to compel implementation or to recover damages.

D. Federally-Permitted Sources

DEP understands that EPA does not have the authority to grant flexibility from the requirements of any federal statute. In the event that a future ERP sector includes facilities that have federal permits, EPA cannot grant flexibility from any federal statutory requirements.

V. PROCESS FOR OBTAINING FLEXIBILITY THROUGH SECTOR SPECIFIC ADDENDA

The following sections describe the content, process steps, timelines, and decision criteria for sector-specific addenda:

A. Content of Addenda

The sector-specific addenda that will be developed will include specific information for that sector with respect to at least the following topics:

- a. regulatory flexibility being sought;
- b. superior environmental performance expected from that sector;
- c. measurement and evaluation;
- d. key agency contacts; and
- e. stakeholder involvement unique to that ERP sector's development.

Each sector-specific addenda will be individually reviewed for legal sufficiency and to ensure that the addenda comports with the XL criteria as identified in this FPA. The sector-specific addenda will not repeat information which is contained in this FPA. Each sector addenda will also be separately negotiated and signed and be submitted for notice and comment in the Federal Register.

B. Process and Timelines for Developing Sector-Specific Addenda and Obtaining Needed Flexibility

Step 1: ERP Sector Identification and Development

Step 2: DEP submits Draft Regulations to EPA for Review

EPA confirms, in writing, needed flexibility

(Three Weeks)

Step 3: DEP prepares and submits to EPA a Draft XL FPA Addendum⁷

(Four Weeks)

Step 4: EPA Review of Draft Addendum

EPA gives DEP a draft written decision on whether

flexibility will be granted, and the legal mechanism to implement flexibility.

(Four Weeks)

Step 5: Public Review Process

Draft Regulations Go Out for Public Review

Draft Addenda Goes into Federal Register

Close of Public Comment Period

(30 Days)

Step 6: Finalize Addendum

(Three weeks)

Step 7: EPA initiates and expedites legal mechanism to ensure flexibility.

STEP 1. ERP Sector Identification and Development

DEP and EPA are committed to working together to ensure that communications are frequent, open, honest and directed toward resolving issues so that ERP's continued success can be optimized. DEP will identify the ERP sector and initiate discussions with EPA through informal meetings as well as the ERP Design Team and other interested stakeholders about the nature of the regulatory program contemplated, including possible areas of flexibility for said ERP sector. Both DEP and EPA recognize that early identification of potential obstacles and the appropriate staff who need to be involved in resolving them will result in quicker progress. During early consultations, DEP and EPA will identify issues that need attention, possible

⁷ Addenda will be submitted by DEP only for those sectors for which flexibility from federal regulations or policies is needed.

barriers to implementation, uncertainties regarding risks, and value added to all parties. These discussions will be open and candid and will provide DEP with information that will be important and useful for the development of the proposal. While early consultation is encouraged, not all proposals will require the same degree of discussion. By the end of Step 1, both EPA and DEP should have a fairly good idea as to where flexibility is needed.

During this time, DEP and EPA will also facilitate interaction between the two agencies. They will identify lead personnel within DEP and EPA for each ERP sector; identify resource commitments (e.g., financial assistance to be provided by EPA); and coordinate outreach compliance and enforcement activities before, during and after sector development. In the event that EPA fails to meet the timelines contained in the FPA, DEP will continue to develop and implement the ERP program as it deems necessary and appropriate.

STEP 2: Draft Regulations and Flexibility Identification (Three Weeks)

After discussions and issue identification in Step 1, DEP will prepare and submit draft regulations to EPA. DEP will also identify needed federal regulatory flexibility. Within three weeks of receiving the draft regulations, EPA will respond to DEP with a confirmation, in writing, of any needed regulatory flexibility. At the same time, EPA will identify, in writing, any additional regulatory flexibility not specified by DEP.

STEP 3: Preparation of Draft Sector-Specific Addendum (Four Weeks)

Within four weeks of receiving written confirmation from EPA of needed regulatory flexibility, DEP, in consultation with EPA and interested stakeholders, will prepare a draft sector-specific addendum for EPA review. The addendum will identify the flexibility being requested by DEP; identify, based on the concepts outlined in Section III.A of this Agreement, the superior environmental performance that will result from implementation of ERP for the sector; and describe, based on the concepts outlined in Section III.C of this Agreement, the evaluation strategy for the sector.

STEP 4: EPA Review of Draft Addendum; Draft EPA Decision on Flexibility and Legal Mechanism(s) (Four Weeks)

EPA will complete review of the draft XL FPA addendum within four weeks of its receipt from Massachusetts. EPA will have primary responsibility for ensuring that appropriate EPA personnel review the draft addendum and draft regulations, and engage in the decision on whether to grant requested flexibility. This responsibility includes distribution within the Region, to affected EPA National program managers and to the EPA Office of Reinvention; review of the proposal and response to DEP; and appropriate national stakeholder involvement. In cases where national policy or regulatory issues are involved, the EPA Regional Administrator must ensure complete review by relevant national program offices. In addition, as part of the review of the addendum, EPA will determine the possible legal mechanism(s) that will be used to implement the requested flexibility.

DEP will seek input from other interested stakeholders, including environmental groups and the regulated community, to identify the strengths and weaknesses of the proposed flexibility.

Within four weeks of receiving the draft XL FPA addendum, EPA will provide DEP with a draft written decision on whether to grant flexibility and identify, in writing, the legal mechanism to implement it. The legal mechanism(s) identified by EPA will then be incorporated into the draft addendum. A draft decision to grant flexibility shall bind EPA, provided that there are no public comments which warrant change to the proposed flexibility. However, even though EPA is bound to its decision, EPA cannot guarantee such flexibility until the appropriate notice and comment procedures have occurred (i.e., notice and procedures that are outside the XL process) and any necessary comments have been incorporated.

If flexibility is denied, the decision will include a rationale for such determination. DEP may initiate a review of such denial as described in Section V.E.

STEP 5: Public Review Process

Both the draft sector regulations and the draft addendum will be made publicly available and comments will be accepted for a specified time period. To the extent possible, the state notification process and public review period for the draft regulations and the draft addendum will be the same. DEP will “announce” availability of the addendum by publishing a notice in newspapers and on the World Wide Web. DEP will also notify specific groups or individuals as appropriate, particularly those that were involved in developing the draft regulations. The notice will inform the public that DEP is requesting that EPA grant DEP flexibility from certain regulatory requirements and explain how a copy of the sector-specific addendum can be obtained.

STEP 6: Issuance of Final Addendum/Decision to Grant Flexibility

Within three weeks of the close of the public comment period, DEP and EPA will decide whether any change to the flexibility proposed in the addendum is needed. Both DEP and EPA will consider comments including those received through the state regulation promulgation process and through the federal notice and comment procedures, and either party may suggest modifications to the addendum based on these comments. If, based on public comment, no change to the proposed flexibility is needed then the addendum will be signed by EPA and DEP. If EPA and DEP agree to needed changes, the addendum will be revised and put out for public review again as described in Step 5. If DEP and EPA disagree as to whether a change is needed, either party may seek resolution through the process described in Section V.E. In addition, EPA will provide DEP with a written rationale for why change is needed.

STEP 7: Legal Mechanism Implementation

EPA shall initiate and expedite the legal mechanism to implement the flexibility granted. DEP and EPA will coordinate outreach compliance and enforcement activities to ensure that federal activities are consistent with the flexibility granted.

C. Criteria for EPA Decision to Grant Flexibility

In determining whether to grant flexibility, EPA will consider the expected superior environmental benefits associated with implementing ERP for the sector, whether the request for flexibility comports with XL program criteria, comments by stakeholders, and any statutorily mandated requirements to which EPA is

bound in promulgating legal mechanisms to implement such flexibility. EPA will also consider the benefits associated with ERP as a whole in making its decision to grant flexibility.

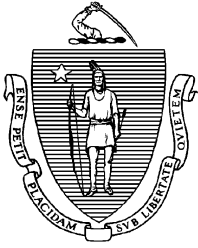
D. Legal Mechanisms for Implementing Flexibility

DEP and EPA recognize that there must be existing legal mechanisms to implement any flexibility granted. These mechanisms will be identified in the sector-specific addenda, which goes out for public comment consistent with the requested flexibility. In some instances, the legal mechanism to address the requested regulatory flexibility will be contained in EPA decisions, including but not limited to, rulemakings, SIP revisions and delegations. Such mechanisms must comply with federal statutory standards and procedures for public review and comment which must be completed before EPA can providing the state with a definitive answer on requests for federal regulatory flexibility. For such decisions, EPA commits to expediting these procedures wherever appropriate to act on DEP's request for federal flexibility quickly. In addition, EPA's decision to grant flexibility pursuant to the signed addendum can be changed only on the basis of public comments received as part of statutorily-required standards and procedures for public review unique to the implementing legal mechanism.

E. Process to Identify and Resolve Policy Issues

Any issues between EPA and DEP will be resolved within the principles and practices of XL and ERP, as outlined in this Agreement. Differences between the agencies regarding such issues may arise at any point in the process of drafting or finalizing regulations or addenda. Issues of concern may be identified by DEP, EPA, or as a result of stakeholder comments. To the greatest extent possible, such issues should be resolved at the staff level. If this is not possible, issues will be clarified and raised up through DEP and EPA management for expedited resolution and agreement. Policy issues of national impact will be raised to EPA's designated contacts in the appropriate national program offices. In all cases, EPA will commit to expediting this decision making process and making final decisions based on the criteria contained in this FPA.

In the event that a dispute arises during this process or DEP disagrees with an EPA decision, DEP may appeal in writing to the EPA Deputy Administrator. DEP may also request a review by a panel consisting of EPA senior managers, environmental commissioners from other states and key stakeholders. The panel will review the proposal, the issues, and the merits of the dispute, and submit recommendations to the EPA Deputy Administrator for a final decision.



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ATTACHMENT A

Anticipated Proposed Flexibility

- Dry Cleaners - record retention
- Photo Processors - no flexibility needed
- Printers - expedited SIP approval
 - VOC limit on alcohol-free fountain solution

